Filed 3/2/10 In re Evelyn C. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re EVELYN C., et al., Persons Coming Under the Juvenile Court Law.	B217473 (Los Angeles County Super. Ct. No. CK56382)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JASMINE L., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Emily Stevens, Judge. Affirmed.

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, James M. Owens, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * * * * *

Defendant and appellant Jasmine L. (Mother) appeals from the order terminating her parental rights as to the children Evelyn C., N.C. and G.C. Though she did not raise this issue below, she contends that she met her burden to establish an exception to termination codified in Welfare and Institutions Code section 366.26, subdivision (c)(1)(A).[1] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts Supporting Detention.

In October 2007, the Los Angeles County Department of Children and Family Services (Department) received a referral that Mother had neglected the children Evelyn (age 3), N.C. (age 2) and G.C. (age 1). According to the referral, the home was unsanitary, Mother would sneak out at night when the children were sleeping and Mother had failed to take Evelyn to a doctor even though she had complained of a rash around her vagina for several days. The referral also alleged that Mother and Ruben C. (Father) were currently separated. He had been arrested for domestic violence two years earlier and Mother had subsequently allowed him to contact her and the children despite the existence of a restraining order.

During an unannounced visit, a social worker observed that while the home was cluttered and messy, it was neither unsanitary nor unsafe. The children did not have any marks or bruises, though Evelyn did complain about vaginal pain. Mother admitted that she had allowed Father to reside at the home notwithstanding the restraining order, but denied any current domestic violence. Father stated that he had previously abused drugs—which fueled the domestic violence—but had completed a drug treatment program and was clean and employed. A grandfather who resided in the home reported that Mother and Father were not currently engaged in domestic violence. He further reported and Mother admitted that she had "checked out" earlier in the year, leaving the

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[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

home for approximately one month without the children. Mother and Father signed a safety plan agreeing to take Evelyn to the doctor, clean the home of debris and install certain safety features. A Department follow-up a few days later revealed that Mother had taken Evelyn to a doctor, but had not returned with a urine sample as directed. Nor had Mother followed through with a cardiologist referral for G.C.

On October 24, 2007, the Department held a team decision meeting. Mother provided proof that Evelyn was on antibiotics and that she was following through with the cardiologist referral. Mother then disclosed that Father was verbally abusing her; she was afraid and wanted him to leave the home. Father agreed to move out. The Department provided referrals for counseling and domestic violence treatment programs and, given Mother's agreement to participate in family preservation services and abide by the restraining order, it permitted the children to remain placed with Mother.

On October 29, 2007, the Department filed a petition pursuant to section 300, subdivisions (a), (b) and (j), alleging that Mother and Father had a history of domestic violence, the children suffered from medical neglect and Father had a history of drug abuse, each of which placed the children at risk. The juvenile court declined to detain the children, but ordered that Father not be in the home while the restraining order remained outstanding. It released the children to Mother and set the matter for adjudication.

Jurisdiction and Disposition.

In the November 29, 2007 jurisdiction/disposition report, Mother reported that Father had physically abused her since 2003 when she was age 16, soon after Evelyn had been born. At Father's urging, Mother had falsely reported that the maternal grandfather had hit her, and as a result she and Evelyn were removed from his custody for approximately one and one-half months. She was returned to the maternal grandfather's care after admitting how her injuries had occurred. Subsequently in 2006, the physical and verbal abuse by Father escalated, particularly when he was under the influence of drugs. Father was arrested for and convicted of domestic violence in April 2006. Nonetheless, Mother reconciled with him less than two months later when he was released from jail, in violation of a restraining order. Mother and Father admitted

delaying taking G.C. to a cardiologist for a heart murmur that was diagnosed when he was born; Mother assumed the condition would go away. Further, Mother and Father admitted delaying taking Evelyn to a doctor after she complained of a burning sensation when she urinated and failing to provide a requested urine sample to the doctor. Both Mother and Father expressed an interest in accepting services in order to care for their children.

Mother and Father waived their right to a contested hearing and submitted that there was a factual basis for jurisdiction as described in the Department's reports. The juvenile court sustained the section 300 petition as to counts (b)(3) and (b)(4) regarding Father's prior drug use and Mother and Father's history of domestic violence, and dismissed all remaining counts. Proceeding immediately to disposition, the juvenile court placed the children with Mother on the condition that she attend domestic violence and parenting education programs. The juvenile court ordered Father to attend a drug rehabilitation program with random testing, as well as a domestic violence program.

Subsequent Petition.

On December 20, 2007, the Department filed a subsequent petition pursuant to section 342. The Department reported that the children had been detained three days earlier after Mother had gone to work and failed to return by the following day. Moreover, the Department reported that since disposition Mother had missed both medical appointments for the children and a family preservation meeting. She had also permitted Father to have unmonitored access to the children, dropping them off at Father's location and picking them up later. Father had not enrolled in a drug abuse program and had missed scheduled drug testing. At the detention hearing, the juvenile court detained the children from Mother's custody and ordered that Mother and Father were to have separate, monitored visits. It also reaffirmed that Mother and Father were to comply with the disposition order.

The January 2008 jurisdiction/disposition report indicated that the children were residing with a maternal great aunt, Sheila L. (Aunt). Mother revealed in an interview with the social worker that she was having difficulty complying with the disposition

order. She stated that she would sometimes drop the children off with Father because she was tired and overwhelmed. Father indicated that he knew he was violating the restraining order by taking the children, but he did not know what else to do. He also admitted that he had a drug problem and acknowledged recently relapsing. Both Mother and Father indicated their willingness to cooperate with the Department. Evelyn, the only child old enough to make a statement, indicated that she missed Mother and wanted to go home with her.

At the January 24, 2008 jurisdiction hearing, the juvenile court sustained the section 342 petition as pled, finding true allegations under section 300, subdivisions (b) and (g) that Mother left the children in the care of the maternal great-grandmother without making any provision for their support, Mother permitted the children to have unmonitored visits with Father and Mother failed to comply with court orders. As part of a supplemental case plan, the juvenile court ordered Mother to participate in individual counseling and ordered monitored visitation for both Mother and Father, allowing the Aunt to serve as a monitor.

Permanency Planning.

A May 2008 review report indicated that Mother and Father had reunited and were primarily living in Mother's car. They recently had begun parenting classes and individual counseling and regularly engaged in monitored visits with the children. The visits were appropriate and the children were very attached to both Mother and Father. The social worker had discussed adoption and legal guardianship with the Aunt and her husband (Uncle) with whom the children resided, and they indicated their willingness to provide the children with a permanent plan. Given that Mother and Father had exhibited some progress, at the May 2008 six-month review hearing the juvenile court found it was in the children's best interests to continue reunification services for an additional six months.

By November 2008, Mother and Father had separated, and Father had been incarcerated for several months for robbery. He told the Department he was homeless and not doing well. He had not visited the children. Neither Mother nor Father were

enrolled in any court-ordered programs. Mother had not visited the children since August 2008, informing the Department that she had obtained a job as a live-in nanny and thus had little time to visit. Between June and August 2008, she visited for a total of six hours.

The children continued to reside with the Aunt and Uncle and were developing appropriately. While they asked for Mother and Father on occasion, they did not seem to be affected by the lack of visitation. Given Mother and Father's inconsistency and lack of visitation, the Department recommended that reunification services be terminated. The Department indicated that the Aunt and Uncle remained interested in providing a permanent home for the children. A visitation log the Aunt prepared indicated that as early as February 2008 she had discussed with Mother the need for stability in the children's lives; she told Mother that if Mother did not want to parent the children, she and Uncle would "be willing to adopt them and raise them as our own."

After the contested 12-month review hearing was continued to January 2009, the Department reported that Mother and Father had reunited during that period and were both living on the streets. Mother had visited the children for two hours during the preceding two-month period. She established that she had completed a parenting class. Father had not visited and had a positive drug test. Father and the social worker testified at the hearing. Finding that Mother and Father were not in compliance with their case plans and that there was no substantial probability the children would be returned to their care, the juvenile court terminated reunification services.

The Department's June 2009 review report stated that the children continued to live and thrive in the home of the Aunt and Uncle, who provided them with a "safe and stable environment," and that the children were extremely bonded to the Aunt and Uncle. An adoptive homestudy was approved in May 2009. According to the adoptions social worker, the Aunt and Uncle had provided for the children in every way and the children viewed them as their family. The Department further reported: "The prospective adopting parents are interested in providing these children with a permanent home through adoption. The applicants understand that adopting a child included [*sic*] all the

rights and responsibilities of biological children. The applicants welcome this commitment of parenthood." Likewise, the Department's section 366.26 report indicated that the Aunt and Uncle were interested in adoption and not legal guardianship. According to the Department: "The applicants want to provide a stable home for the children through adoption where they will have continued contact with extended family members. Family and friends are supportive of this couple['s] desire to adopt. . . . [¶] . . . [¶] The prospective adoptive parents understand the differences between Long Term Foster Care, Legal Guardianship and Adoption. The applicants definitely want to adopt."

A concurrent planning assessment (CPA) that appears to have been prepared over one year earlier in May 2008 but signed in May 2009 was consistent with the Department's other reports. At that point, the Aunt indicated that she was interested in adopting all three children. Given the stage of the proceedings, the Aunt added that she hoped Mother would gain back custody but that she was "committed to providing a permanent plan through adoption if reunification fails."

Also in June 2009 the Department reported that Mother and Father married in May 2009 and had visited with the children on four occasions since the last hearing. In a July 2009 supplemental report, the Department indicated that while the visits were appropriate, the children referred to the parents as "Mommy Jasmine" and "Daddy Ruben" and never inquired about Mother and Father in their absence. On the other hand, the children referred to the Aunt and Uncle as "Mommy and Daddy" and appeared to be well bonded to them. Moreover, multiple individuals—including relatives, teachers and service providers in the community—submitted letters to the juvenile court regarding their observations about the safe, stable and secure home environment the Aunt and Uncle had provided for the children.

Mother and Father testified at the July 2009 permanency planning hearing. Mother stated that she had discontinued her visits because the Aunt had discouraged her from visiting. She also testified about her recent visitation, acknowledging that the children did not necessarily want to stay with Father and her at the end of the visits. Father also described his recent visits with the children. In closing argument, both

Mother's counsel and Father's counsel asserted that parental rights should not be terminated because the parents had established the beneficial relationship exception to termination set forth in section 366.26, subdivision (c)(1)(b)(i).

The juvenile court rejected their arguments, finding that neither Mother nor Father had established a close parental bond with the children. It concluded that there would be no detriment to the children in terminating parental rights and found by clear and convincing evidence that the children were likely to be adopted. Accordingly, the juvenile court terminated Mother's and Father's parental rights. Mother appealed.

DISCUSSION

Though she did not assert this below, Mother contends on appeal that the juvenile court erred in terminating her parental rights because it failed to apply the exception to termination set forth in section 366.26, subdivision (c)(1)(A), which provides in relevant part that once a child has been found to be adoptable "the court shall terminate parental rights unless . . . . [¶] (A) The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child." We find no merit to her contention.

Initially, we conclude that Mother forfeited this claim of error by not raising it at the permanency planning hearing or at any other time in the juvenile court. It is well established that "[a] party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221.) A "reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] . . . . [¶] Dependency matters are not exempt from this rule." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. omitted.) Forfeiture applies to claims of statutory error

and even to claims of violations of fundamental constitutional rights. (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

Mother never argued in the juvenile court that her parental rights should not be terminated because the Aunt and Uncle were unable or unwilling to adopt the children within the meaning of section 366.26, subdivision (c)(1)(A). Though Mother characterizes the statutory exception as "new" and its application a matter of "first impression," the statutory exception had been in effect for almost two years at the time of the permanency planning hearing and had been the subject of several appellate decisions. (§ 366.26, subd. (c)(1)(A), added by Stats. 2007, c. 583, § 28.5, and Stats. 2007, c. 565, § 4; see, e.g., *In re A.A.* (2008) 167 Cal.App.4th 1292, 1324; *In re Xavier G.* (2007) 157 Cal.App.4th 208, 213–215.) By not raising the exception below, Mother has forfeited the issue on appeal.

In any event, Mother's contention is unmeritorious. At a section 366.26 hearing, the juvenile court must determine a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the California Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53; *In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1408.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds that one of the statutory exceptions to termination permit it to choose an option other than the norm. (*In re Celine R., supra,* at pp. 53–54.) The parent challenging termination bears the burden of proof to establish that one of the enumerated statutory exceptions to termination applies. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343–1345.)

We review the juvenile court's findings under section 366.26 for substantial evidence. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) We view the evidence in the light most favorable to respondent, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) "It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins

and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631.)

Here, substantial evidence supported the juvenile court's order terminating parental rights. Mother failed to present evidence at the section 366.26 hearing to support application of the exception under subdivision (c)(1)(A) on the basis that the Aunt and Uncle were unable or unwilling to adopt the children. Rather, the Department's reports consistently showed that the Aunt and Uncle were interested in adopting the children and providing them with a permanent home. The Aunt told Mother as early as February 2008 that she was willing to adopt the children if Mother was unable to parent them. The Aunt and Uncle participated in an adoptive homestudy that was approved in May 2009. In its assessment of whether the Aunt and Uncle understood the differences between the permanent plans of adoption, guardianship and long-term foster care, the Department succinctly stated: "The applicants definitely want to adopt." Neither the Department's reports nor any testimony presented at the section 366.26 hearing suggested that the Aunt and Uncle exhibited any inability or unwillingness to adopt the children.

Mother's entire argument hinges on comments made by the Aunt and Uncle in the CPA, a report which was signed in 2009 shortly before the permanency planning hearing but elsewhere indicates that it was prepared as part of an assessment that took place between March and May 2008. As of May 2008, the juvenile court had not yet terminated reunification services. In the CPA, the Aunt qualified her comments to reflect the current state of affairs, stating that she understood the rights and responsibilities of adoption, she had no reservations about adoption, and she was "committed to providing a permanent plan through adoption if reunification fails." Tellingly, in a further CPA that was prepared solely for N.C. in February 2009—after reunification services had been terminated—the Aunt expressed her unqualified desire to adopt N.C. and his siblings. Contrary to Mother's assertion in her belated reply brief, the Aunt and Uncle exhibited no ambivalence about adoption at the time of the permanency planning hearing. In view of

the evidence, there was no basis for the juvenile court to apply the exception to termination set forth in section 366.26, subdivision (c)(1)(A).

DISPOSITION

The order terminating parental rights is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ